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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 623

AMERICAN CAR AND FOUNDRY COMPANY,
A CORPORATION,
Petitioner,

vs.

H. A. BRASSERT,
Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

ROY O. WEST,
PERCY B. ECKHART,
WILLIAM ROTHMANN,
LEWIS C. JESSEPH,
Proctors for Respondent.

THE GUNTHORP-WARREN PRINTING COMPANY, 816 WEST JACKSON, CHICAGO

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SUMMARY OF ARGUMENT.

I.

AT THE TIME THE MOTOR BOAT WAS DESTROYED, PETITIONER WAS NOT ITS OWNER WITHIN THE MEANING OF THE WORD "OWNER" AS USED IN THE UNITED STATES STATUTES LIMITING THE LIABILITY OF SHIPOWNERS.

"G" *The Milwaukee*, 48 F. (2d), 842, does not support petitioner's contention. In that case vendor remained in possession of the car ferry after the contract of sale, and was operating the ferry at the time of the accident.

"H" A charterer who has possession and control of

the vessel and hires a master and crew, although not an owner, is nevertheless liable for the torts of the ship. Under such circumstances, the general owner is not liable since the vessel is not being operated by his agent or for his account.

II.

THE UNITED STATES STATUTES LIMITING THE LIABILITY OF "OWNERS" DO NOT APPLY TO ONE ENGAGED SOLELY IN THE MANUFACTURE OF GASOLINE-PROPELLED YACHTS AND CRUISERS OR OTHER VESSELS.

"A" Summary the same as in original brief, p. 7.

"B" Prior to launching, a ship is a "mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house * * *." The Limited Liability Act was not passed to protect the builder of a land structure.

III.

AT THE TIME OF ITS DESTRUCTION, THE MOTOR BOAT WAS NOT MANNED AND OPERATED BY A MASTER AND CREW OF PETITIONER. THERE IS NO LIABILITY, THEREFORE, THAT CAN BE LIMITED. THE LIBEL DOES NOT STATE A CAUSE OF ACTION.

Sec. 187, Chap. 46, U. S. C. A., specifically provides that the liability of the master and crew shall not be affected by the preceding sections limiting the liability of the shipowner. The shipowner is liable for his own negligence and contracts, and liable to the extent of the ship and freight for the negligence and misconduct of the master and crew. He is relieved of liability only for the negligence of the master and crew beyond his interest in the ship and freight.

ARGUMENT.

I.

AT THE TIME THE MOTOR BOAT WAS DESTROYED, PETITIONER WAS NOT ITS OWNER WITHIN THE MEANING OF THE WORD "OWNER" AS USED IN SECTION 183, TITLE 46, U. S. C. A. AND OTHER UNITED STATES STATUTES LIMITING THE LIABILITY OF SHIPOWNERS.

For Points "A" to "F" incl. see original brief, pp. 9 to 18 incl.

"G" *cont'd. The Milwaukee*, 48 F. (2d) 842, is cited by petitioner to sustain its contention that it was the owner of the motor boat within the Limited Liability Act. We believe the case holds quite to the contrary.

The facts of the case were that for a number of years the Car Ferry Company, a Wisconsin corporation, had been operating a car ferry at Milwaukee. In December, 1928, it entered into an agreement with the Grand Trunk which recited that "The Car Ferry Company, for the considerations hereinafter mentioned, hereby sells, assigns and transfers to the Grand Trunk all its physical and other assets, including said car ferries, * * *."

The agreement further provided that it and all its provisions were subject to the approval of the Interstate Commerce Commission "as to all or such parts thereof as may be within the jurisdiction of that Commission * * *." In the meantime, the Car Ferry Company continued in possession of the car ferry and was operating it when the accident occurred. It was its liability for the damage resulting from such accident which the Car Ferry Company sought to limit.

The facts, therefore, are just the reverse of the facts in this case. There, the vendor party was in possession and control of the car ferry and was operating it at the time of the accident. Here, the vendor had parted with the possession and control of the motor boat, and the vendee was operating and in full control of it at the time of the accident.

In discussing the meaning of the word "owner" in the Limited Liability Act, the court said at page 842:

> "The judicial history of the act demonstrates that the question of ownership has been tested out, not by rigid inquiry respecting the muniments of title showing ownership to be absolute and unreserved, nor upon the mere form of transactions involving an interest in a vessel. Rather is the inquiry directed to the relationship of one asserting himself, or charged to be, the owner with a view of ascertaining whether the relationship, whatever it is found to be, might reasonably furnish ground upon which a claim of *liability for damage could be asserted.*"

Speaking of the decision of this court in *Flink* v. *Paladini*, 279 U. S. 59, the court, in The Milwaukee case, said at page 842:

> "That case seems to indicate that whether or not one is to be deemed as 'owner' depends largely upon the possibility that he may be subjected to a liability which ordinarily is assertable against one having, or claiming to have, proprietorship or dominion over the subject of the proceeding. It negatives the thought that 'owner' of, or to 'own' a vessel means the situs of full title, interest, or dominion, and that nothing else is within the definition of the right or the range of the statute."

This case clearly indicates that the real test of ownership for the purposes of the Limited Liability Act, is one of "proprietorship or dominion" over the vessel under such circumstances as to create liability. Applying this test, petitioner was not an owner. It was not in pos-

session of the motor boat at the time of the accident; neither had it any control or dominion over the boat of any kind whatsoever. It could not be held liable for the "embezzlement, loss or destruction * * * of any property, goods or merchandise shipped or put on board such" motor boat.

"H" A charterer who mans, victuals and navigates the vessel is deemed the owner for the purposes of the Limited Liability Act. It is so provided by Section 186, Title 46, U. S. C. A. and such was the law before the statute was passed.

24 R. C. L. 1108, 1109.

Marcardier v. *The Chesapeake Insurance Company*, 8 Cranch, 39, 49.

Sturgis v. *Boyer*, 24 How. 110, 124.

Reed v. *United States*, 11 Wall. 591, 600-601.

Thorp v. *Hammond*, 12 Wall. 408, 415-416.

The Barnstable, 181 U. S. 464, 468.

United States v. *Neptune Line*, 12 F. (2d) 568, 569.

In re Reichert Towing Line, 251 Fed. 214, 217.

Walker v. *Boston Insurance Company*, 14 Gray, (Mass.) 288, 294-295.

Section 186, Title 46, U. S. C. A., taken from the Act of March 3, 1851, (Sect. 4286 R. S.) is as follows:

> "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at this own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; *and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.*"

The general rule governing the liability of the charterer of a vessel is stated in 24 R. C. L. 1108, as follows:

"A charterer who is owner for the voyage or serv-

ice stipulated assumes in a large measure the customary rights and liabilities of vessel owners in relation to third persons who have dealt with him or with the ship. He, and not the general owner, is usually liable for repairs and supplies ordered for the vessel, and for the other expenses of the voyage, including the wages of seamen *and the vessel's torts.* The general owner is not liable in such cases, because the *vessel is not being operated by his agents or for his account.*"

It is further said at page 1109:

"The charterer of a demised vessel, who as owner pro hac vice appoints and controls the master and crew, *is exclusively liable for their contracts and torts, since they are his agents and not those of the general owner.*"

In *Marcardier* v. *The Chesapeake Insurance Co.*, 8 Cranch, 39, it is said at page 49:

"A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. Such is understood to have been the case of *Vallejo* v. *Wheeler*, Cowp. 143. But where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered as a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership; such was the case of *Hooe & Co.* v. *Groverman*, in this court, 1 Cr. 214. In the first case, the general freighter is responsible for the conduct of the master and mariners during the voyage; in the latter case, the responsibility rests on the general owner."

In *Reed* v. *United States*, 11 Wall. 591, it is said at page 600:

"Charterers or freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the

exclusive possession, command, and navigation of the vessel for the stipulated voyage."

In *Sturgis* v. *Boyer*, 24 How. 110, 124, and *The Barnstable*, 181 U. S. 464, 468, the same rule of liability is announced and applied.

Section 186, Title 46, U. S. C. A., and these cases, clearly demonstrate that the "general owner" or the owner of the bare legal title, is not necessarily the "owner" under the Limited Liability Act. They also show that the liability subject to limitation is that arising out of the navigation or operation of the vessel. They indicate that a person who is not charged with responsibility for the operation or navigation of the vessel at the time the accident occurred, can not limit liability. Such person is not the "owner" within the meaning of the statute.

As the Circuit Court of Appeals well said in its opinion (R. 36) "It must be borne in mind that appellee's cause of action is not based on appellant's ownership. Appellant is not sued as an owner, but as a manufacturer or builder, and the gist of the action is appellant's direct negligence in construction, equipment, and inspection, a failure of duty which, so far as liability is concerned, is in no way connected with maritime enterprises or with appellant's ownership."

II.

THE UNITED STATES STATUTES LIMITING THE LIABILITY OF "OWNERS" DO NOT APPLY TO ONE ENGAGED SOLELY IN THE MANUFACTURE OF GASOLINE-PROPELLED YACHTS AND CRUISERS OR OTHER VESSELS.

This point is found at page 24 of our original brief.

"A" In addition to the cases cited in our original

brief holding that the Limited Liability Act was passed to promote shipping or maritime commerce, we respectfully direct the court's attention to the following:

United States v. *Hamburg-Amerikanische Packetfahrt Actien Gesellschaft*, 212 Fed. 40, 44.

Simpson v. *Story*, 145 Mass. 497, 498-499.

Chamberlain v. *The Western Transportation Company*, 44 N. Y. 305, 307-308.

Baird v. *Daly*, 57 N. Y. 236, 250.

Carroll v. *Staten Island Railroad Co.*, 58 N. Y. 126, 142.

These cases deal in some respects with the Limited Liability Act of 1851, either before or after its amendment in 1884 and 1886. The light they throw upon the questions for determination may be of interest here.

United States v. *Hamburg, Etc.*, 212 Fed. 40, was a proceeding involving the right of a shipowner to limit liability against a claim of the United States. At page 44 of the opinion the court said:

> "The Limited Liability Act was passed for the purpose of putting American shipping upon an equality with that of other maritime nations, and also because it was believed to be of great importance to the country that our maritime commerce should be encouraged and extended. Mr. Justice Bradley, in *Norwich Co.* v. *Wright*, 13 Wall. 104, 20 L. Ed. 585, in giving the reasons which led to the passage of the act, pointed out that:
>
> "'The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. * * * The public interests require the investment of capital in shipbuilding, quite as much as in any of these enterprises.'
>
> "*The public benefit which was to be derived from the upbuilding of the shipping interests was the pur-*

pose of the act and the only proper justification for its enactment. It is most important that this fact be kept in mind in any attempt to construe the law."

Simpson v. *Story*, 145 Mass. 497, was an action to recover for repairs done and supplies furnished a fishing schooner owned by defendants in equal parts. Story alone defended and requested an instruction under the Limited Liability Act of 1884 (Sec. 189, Chap. 46, U. S. C. A.) which was refused on the ground that the act did not apply to fishing vessels. In discussing the object of the act, and the prior legislation with reference to limited liability, the court said at page 498:

"Looking at the statute now under consideration, U. S. St. of June 26, 1884, c. 121, sec. 18, in this manner, it appears that it was not the design of Congress to include fishing vessels within its provisions. Its title is, 'An act to remove certain burdens on the American merchant marine, and encourage the American foreign carrying trade and for other purposes.' The object of the prior legislation which was amended, as well as of the act in question, was to promote the building of ships, and to encourage persons engaged in the business of navigation, with special reference to the foreign carrying trade; so that American vessels might enter into this trade in competition with foreign vessels, and on more nearly the same terms. See *Moore* v. *American Transportation Co.*, 24 How. 1; *Walker* v. *Transportation Co.*, 3 Wall. 150. This is shown by the whole history of the legislation, and by the course of the discussions in Congress. See Cong. Record, 48th Congress. American vessels were subject to burdens which foreign vessels were free from; and all the other sections of the statute had reference to the removal of such burdens. Section 18 was not in the original bill introduced in the House of Representatives, but it is found in substance in a bill introduced in the Senate, which proceeded concurrently with that in the House; and it was retained in the report of a joint committee of conference. Prior statutes had established an exemption or limitation of responsibility for losses by fire, embezzlement, and other-

wise, but they did not include any exemption in respect to debts; and similar limitations existed in foreign countries."

Chamberlain v. *The Western Transportation Company*, 44 N. Y. 305, was an action to recover the value of personal baggage shipped on board the propeller Racine, between Detroit and Buffalo. Defendant sought to limit its liability under the Limited Liability Act, but it was contended by plaintiff that personal baggage was not "goods or merchandise" within the meaning of such act. In disposing of the case, the court briefly relates the historical origin of the law at page 307:

"This common law liability of carriers by water was at an early day limited, in England, by the statutes of 7 Geo. 2, C. 15; 26 Geo. 3, C. 86 and 53 Geo. 3, C. 159. The object of these statutes, as expressed in the preamble to one of them, was 'to promote and increase the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein.' By these statutes the parliament exempted shipowners from liability in several cases of loss, and among them, loss by fire. These statutes were doubtless passed to place English shipowners upon the same footing with the shipowners of the continental nations of Europe, where the extreme rigor of the common law had not been applied to carriers by water. *Moore* v. *American Transportation Company*, 24 How. U. S., 1; Holt's Law of Shipping, 401; Abbott on Shipping, 264.)

"The common law rule remained in force in this country until an act was passed by congress, on the 3rd day of March, 1851 (1 Brightly's Dig. 834), entitled 'An act to limit the liability of shipowners and for other purposes,' which embodies most of the provisions of the English statutes above referred to. This act is supposed to have been passed in consequence of the decision in 6 Howard, *supra*, holding the New Jersey Steam Navigation Company liable for goods lost by fire upon the Lexington, burned upon Long Island Sound. (*Walker* v. *The Transportation Co.*, 3 Wallace, 150.) The object of this

statute, as stated by Justice Caton, in 24 Howard, *supra*, and as appears from the debates in congress at the time of its passage (23 Congressional Globe, 713-718) *was to place our commercial marine on an equal footing with that of Great Britain, so that the increase of the number of ships and the navigation of them might be equally encouraged.*"

Baird v. *Daly*, 57 N. Y. 236, was an action to recover damages resulting from the unskillful management of a tug engaged in towing a scow loaded with cattle across the St. Lawrence River. It was contended that the Limited Liability Act of 1851 ousted the state court of jurisdiction. This contention was denied. In deciding the case, the court commented as follows at page 250:

"The act of 1851 is founded on a great rule of public policy. It was passed in order to encourage the investment of capital in ships. The main intent of Congress was to introduce into the law of shipping the principle of 'limited liability,' which is such a marked element in the law of corporations, distinguishing them from the usual individual or partnership responsibility of owners. The ship-owner must act through agents who might, under the ordinary rules of law applicable to agency, subject him to unlimited liability. The statute, for his protection, allows him to put at risk a limited amount of his capital, as a stockholder in a manufacturing company may do by the general rules of law governing corporate stock."

Carroll v. *The Staten Island Railroad Co.*, 58 N. Y. 126, was an action against a carrier of passengers by water to recover damages for personal injuries caused by the explosion of the ship's boiler. Commenting upon the Act of 1851, the court said at page 142:

"The act of March 3, 1851 (9 Stat. at Large, 635), to limit the liability of ship-owners, etc., does not aid the defendant. That act was passed for the encouragement of American ship-building and to enable American ship-owners to compete, in the carrying of goods, with English ship-owners, who enjoyed

> under English statutes the same exemptions from liability which were extended to the owners of American vessels by the act of 1851."

It will be observed that in all these cases in stating the purpose of the Limited Liability Act, emphasis is placed upon the upbuilding of the "commercial marine," and the "shipping interests"; to "encourage the foreign carrying trade" and to "introduce into the law of shipping the principle of 'limited liability'."

We have not found a case, however, holding or inferring, that the purpose of the act was to limit the liability of manufacturers of gasoline-propelled motor boats and cruisers, in order to promote water sports and recreation. The rights of the citizen to hold the manufacturer liable for his negligence and the negligence of his servants and agents have not been disturbed by these statutes.

"B" That a contract to build a ship is not maritime is abundantly sustained by the authorities. In addition to the cases referred to in our original brief, we cite the following:

> *Tucker* v. *Alexandroff*, 183 U. S. 424, 437-438.
> *The Winnebago*, 205 U. S. 354, 363.
> *North Pacific Steamship Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 126-127.
> *The Thames Towboat Co.* v. *The Schooner Francis McDonald, Etc.*, 254 U. S. 242, 244-245.

North Pacific S. S. Co. v. *Hall Bros. Co.*, 249 U. S. 119, was a proceeding in admiralty to recover for work and labor, services rendered and materials furnished in repairing the steamship Yucatan. The question for decision was one of admiralty jurisdiction. In the course

of the opinion, among other things, it is said at pages 126-127:

> "It is settled that a contract for building a ship or supplying materials for her construction is not a maritime contract. *People's Ferry Co.* v. *Beers*, 20 How. 393; *Roach* v. *Chapman*, 22 How. 129; *Edwards* v. *Elliott*, 21 Wall. 532, 553, 557; *The Winnebago*, 205 U. S. 354, 363. In the case in 20 Howard the court said (p. 402): 'So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land, to be performed on land.' But the true basis for the distinction between the construction and the repair of a ship, for purposes of the admiralty jurisdiction, is to be found in the fact that the structure does not become a ship, *in the legal sense, until it is completed and launched.* 'A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—*as distinctly a land structure as a house, and subject to mechanic's liens created by state law enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction.*' *Tucker* v. *Alexandroff*, 183 U. S. 424, 438."

If, as stated, until launched a ship *"is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house,"* then it certainly cannot be successfully contended the limited liability statutes apply to a liability arising solely out of a land activity. Petitioner's liability in the case at bar arises solely from its negligent act on land in the manufacture and assembly of the motor boat long before it was launched in Lake Michigan.

If a vessel, until launched, is as "distinctly a land structure as a house," and the liability arising out of the

building of the vessel may be limited, why not limit the liability which may arise out of the *building* of the house? What reason exists for the distinction, especially where the builder of the vessel does not navigate her for any purpose whatsoever?

Clearly, the statute was not passed to limit the liability of the builder of vessels where the liability arises out of negligence in the building, but was passed to limit the liability of the "owner of any vessel for any embezzlement, loss or destruction * * * of any property, goods or merchandise, shipped or put on board such vessel * * *." A consideration of the statute itself refutes the idea that the law applies to the petitioner under the facts and circumstances of the case.

III.

AT THE TIME OF ITS DESTRUCTION, THE MOTOR BOAT WAS NOT MANNED AND OPERATED BY A MASTER AND CREW OF PETITIONER. THERE IS NO LIABILITY, THEREFORE, THAT CAN BE LIMITED. THE LIBEL DOES NOT STATE A CAUSE OF ACTION.

This point is found at page 31 of our original brief.

We cite the following additional authorities to this point of the original brief:

Section 187, Title 46, U. S. C. A.

24 R. C. L. 1397.

Walker v. *The Transportation Co.* 3 Wall. 150, 153.

Railroad Company v. *Lockwood*, 17 Wall. 357, 360-361.

Liverpool Etc. Steam Co. v. *Phenix Ins. Co.* 129 U. S. 397, 439-440.

Craig v. *Continental Insurance Co.* 141 U. S. 638, 646.

Section 187, Title 46, U. S. C. A., reads:

> "Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."

This section was a part of the Act of March 3, 1851.

It is evident from this section of the statute that by the preceding sections the shipowner's liability for the acts of the master and crew was limited, but that the liability of the master and crew for their own acts was not affected. It is the imputed liability of the owner for the acts of the master and crew which is limited by Section 183 and other sections. The shipowner and the master and crew remain liable for their own faults and neglect.

In 24 R. C. L. 1397, the rule is thus stated:

> "The limited liability statutes leave a vessel owner liable without limit for his own negligence and contracts, and liable to the extent of the ship and freight for the negligence or misconduct of the master and crew."

These authorities clearly show that it is the imputed liability of the shipowner for the negligence of the master and crew that is limited, as we contend in our original brief.

Walker v. *The Transportation Co.* 3 Wall. 150, was a libel *in personam* to recover damages for the loss of a cargo of wheat shipped from Chicago to Buffalo and destroyed by fire. It was contended that the fire did

not occur through the negligence or misconduct of the respondent or its servants or agents. In the decision it is said at page 153:

> "If, however, there could be any doubt upon the construction of this section (Section 183) standing alone, it is removed by a consideration of the sixth section (Section 187), which, in terms, saves the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. *This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so;* and that is stated to be their negligence and fraud."

In *Liverpool Etc. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, which was a libel in admiralty *in personam* to recover damages for the loss of goods shipped on board a steamer bound from New York to Liverpool, it was said at page 439:

> "By the common law of England and America before the Declaration of Independence, recognized by the weight of English authority for half a century afterwards, and upheld by decisions of the highest courts of many States of the Union, common carriers could not stipulate for immunity for their own or their servants' negligence. The English Railway and Canal Traffic Act of 1854, declaring void all notices and conditions made by those classes of common carriers, except such as should be held by the court or judge before whom the case should be tried to be just and reasonable, was substantially a return to the rule of the common law.
>
> "The only important modification by the Congress of the United States of the previously existing law on this subject is the act of 1851, to limit the liability of ship-owners, (Act of March 3, 1851, c. 43; 9 Stat. 635; Rev. Stat. secs. 4282-4289,) and that act leaves them liable without limit for their own negligence, and liable to the extent of the ship and

freight for the negligence or misconduct of their master and crew."

Can there be any doubt of the soundness of our position on this point? No authorities are cited by petitioner to the contrary, and we have found none.

The relation of master and servant did not exist between petitioner and respondent. No such relation is alleged in the libel, and none arose out of the conditional sale agreement.

The liability which petitioner seeks to limit is that of the manufacturer of motor boats for negligence in manufacturing, equipping and inspecting. Certainly the Limited Liability Act was not designed to affect such liability. To limit such liability would not promote shipping nor encourage the development of the merchant marine. The right of the citizen to hold the master liable for the negligence of the servant which is the familiar law of respondeat superior, should not be taken away by statutory construction. If limited in any way, it should be only by legislation, plain and unambiguous in every respect and clearly designed to accomplish that specific purpose.

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SUPREME COURT OF THE UNITED STATES.

No. 623.—October Term, 1932.

American Car and Foundry Company, Petitioner, *vs.* H. A. Brassert.	On Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit.

[May 8, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner, American Car and Foundry Company, a manufacturer of gasoline propelled yachts and cruisers, made a conditional sale of a cruiser to respondent. While respondent was cruising in the vessel on the waters of Lake Michigan an explosion occurred midship, fire followed, and the vessel became a total wreck and in consequence lay sunken and worthless. Alleging these facts, that respondent and other persons with him on the vessel had been injured, and that respondent's personal effects, as well as the vessel, its machinery, equipment and supplies, were a total loss, and that all the alleged injuries and damages were occasioned and incurred without its privity or knowledge, petitioner filed this libel against respondent seeking limitation of liability under the Act of March 3, 1851, c. 43, sec. 3. 46 U. S. C. 183. Respondent filed exceptions upon the ground that the libel did not disclose that libellant was the owner of the vessel or engaged in maritime commerce, or any facts sufficient to show that libellant was entitled to the limitation. The District Court dismissed the libel and the Circuit Court of Appeals affirmed the decree. 61 F. (2d) 162. This Court granted certiorari, 288 U. S. —.

The libel disclosed that the sole relation of petitioner to the cruiser was that of manufacturer and vendor under a contract of conditional sale. Respondent gave his order for the cruiser to be delivered on the terms stated and subject to warranty against "defects in workmanship and material" which by its terms was limited to replacement of parts. The order was followed by a "conditional sale agreement", by which respondent acknowledged

receipt of the boat in good condition and which provided for the payment of the balance of the purchase price within ninety days after delivery and that, until such payment or tender, title to the boat should remain in the seller. Subject to the conditions of the agreement, the purchaser was entitled to the possession and use of the boat with the right on the part of the seller to retake it and its equipment in case of the purchaser's default. The purchaser was required to keep the boat insured with full marine coverage, to pay all taxes and charges, to comply with all applicable laws, and to hold the seller harmless from all "liability, claim, demand, cost, charge and expense in any way imposed upon or accruing to seller" by reason of the use or operation of the boat. The libel alleged that the vessel when delivered to respondent was "sturdy, safe and seaworthy". The cause of the accident, except as above stated, is not shown. It appears to have occurred prior to any default on the part of respondent and while he was operating the vessel on his own behalf. The libellant, while proceeding directly against respondent, sought limitation against all claims.

The statute[1] limiting the liability of shipowners was enacted to encourage investments in ships and their employment in commerce. That purpose embraced, as petitioner insists, the promotion of shipbuilding, but it was not concerned with construction as a mere enterprise of manufacture, which itself was not a maritime activity (*People's Ferry Co.* v. *Beers*, 20 How. 393, 402; *Edwards* v. *Elliott*, 21 Wall. 532, 554, 557; *Thames Company* v. *The Francis McDonald*, 254 U. S. 243, 244), but with the promotion of commerce and the encouragement "of persons engaged in the business of navigation", to the end that the shipping interests of this country might not suffer in competition with foreign vessels. *Moore* v. *American Transportation Co.*, 24 How. 1, 39; *Norwich Company* v. *Wright*, 13 Wall. 104, 121; *The Main* v. *Williams*, 152 U. S. 122, 131; *Evansville Company* v. *Chero Cola Co.*, 271 U. S.

[1] "The liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending". R. S. 4283, 46 U. S. C. 183.

19, 21; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 214; *Flink* v. *Paladini*, 279 U. S. 59, 62. The statute embodied the principle of the general maritime law that shipowners should not "be liable beyond their interest in the ship and freight for the acts of the master and the crew done without their privity or knowledge". *Butler* v. *Boston Steamship Co.*, 130 U. S. 527, 549. The liability thus limited is an imputed liability; it is a liability imputed by law by reason of the ownership of the vessel. For his own fault, neglect and contracts the owner remains liable. *Richardson* v. *Harmon*, 222 U. S. 96, 103, 106; *Pendleton* v. *Benner Line*, 246 U. S. 353, 356.

Petitioner retained title solely for the purpose of securing the purchase price of the vessel, and prior to default in payment, petitioner had no control over the vessel's operation. Petitioner did not man or operate her, and had no right to do so. For all purposes of use in navigation the vessel belonged to respondent. In these circumstances, petitioner was not liable as owner for acts of respondent or for those of the master and crew. It is well settled[2] that a mortgagee out of possession, and not exercising authority, is not answerable for the acts of the master or other agent of the ship. See *Morgan* v. *Shinn*, 15 Wall. 105, 110; *McIntyre* v. *Scott*, 8 Johns. 159; *Macy* v. *Wheeler*, 30 N. Y. 231; *Brooks* v. *Bondsey*, 17 Pick. 441; *Davidson* v. *Baldwin*, 79 Fed. 95; *Calumet & Hecla Mining Co.* v. *Equitable Trust Company*, 275 Fed. 552; Parsons on Shipping and Admiralty, 129, *note*; Abbott, Merchant Ships and Seamen, 14th ed., p. 55. The same is true of a vendor who retains title as security for the payment of the purchase price. See *Philips* v. *Ledley*, 1 Wash. C. C. 226; Fed. Cas. No. 11,096; *Wendover* v. *Hogeboom*, 7 Johns. 308; *Leonard* v. *Huntington*, 15 Johns. 298; *Thorn* v. *Hicks*, 7 Cow. 697; *Jones* v. *Pitcher*, 3 Stewart, 135; *Hemm* v. *Williamson*, 47 Ohio St. 493; *The Boise Penrose*, 22 F. (2d) 919, 920; *The John E. Berwind*, 56 F. (2d) 13. The principle, generally recognized, was thus emphatically stated in *Thorn* v. *Hicks*, *supra:* "The mere circumstance of the naked legal title to the vessel" remaining in the vendors "to secure the purchase money for which she had been

[2]Compare Jackson *v.* Vernon, 1 H. Bl. 114; Westerdell *v.* Dale, 7 Term Rep. 306; Mitcheson *v.* Oliver, 5 El. and Bl. 419; Tucker *v.* Buffiington, 15 Mass. 477.

sold, unquestionably would not render them liable as owners, on the contracts of the master, or for the consequences of his negligence and unskilfulness".

What, then, is the liability which petitioner seeks to limit? It is manifestly not a liability imputed to petitioner as shipowner. With respect to respondent, the mere fact that petitioner retained the legal title to the vessel, in order to secure the payment of the remainder of the price, neither created liability for the injury alleged to have been sustained on account of the explosion nor conferred immunity. If such liability existed, it arose not because petitioner reserved title, while delivering possession and control of use, but because it was manufacturer and vendor. The question of liability would be determined with reference to the obligations which were expressly assumed by the vendor, or were inherent in the transaction, irrespective of the title retained as security. Similarly, as to other persons who are alleged to have suffered injury from the accident—the possible claimants described in the libel—petitioner's liability, if any, had no relation to any responsibility of petitioner as holder of the naked title, but would depend upon petitioner's conduct as maker of the vessel, that is, upon the question whether in the circumstances petitioner could be held guilty of actionable neglect in its manufacture. See Bohlen, "Studies in the Law of Torts", pp. 109 *et seq.*; *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382. That question is not before us. Whatever liability there may be in that aspect, either to respondent or to others, it is not a liability falling within the policy and purview of the Act of Congress limiting the liability of shipowners.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.